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In the Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD ROE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an appeal from a judgment of civil contempt for failure to comply with a grand jury's subpoena became moot upon the expiration of the grand jury's term.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-18a) is reported at 877 F.2d 83. An order of the court of appeals denying a motion to vacate its opinion (Pet. App. 1a-2a) is unreported. Orders issued and filed under seal by the district court (Pet. Apps. C, D, E), and lodged under seal with the Clerk of this Court, are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a) was entered on June 6, 1989. A petition for rehearing, with a suggestion for rehearing *en banc*, was denied on August 29, 1989. Pet. App. 23a-24a. The petition for a writ of certiorari was filed on October

26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was held in civil contempt for refusing to comply with two grand jury subpoenas. The court of appeals affirmed the contempt order as to one subpoena and reversed as to the other. The court subsequently denied petitioner's motion to vacate its judgment on the ground of mootness. Petitioner seeks further review of the court's disposition of his motion.

1. On October 6, 1988, petitioner was served with three grand jury subpoenas duces tecum, addressed to him as the custodian of the records of three entities. Petitioner refused to comply with two of the subpoenas, claiming that compelling him to produce the subpoenaed records would violate his Fifth Amendment privilege against compulsory self-incrimination. On February 10, 1989, the district court ordered petitioner to comply with the subpoenas. Pet. App. 3a, C, D.

Petitioner persisted in his refusal to comply, and on March 2, 1989, the district court held him in civil contempt. The court's contempt order committed petitioner to the custody of the Attorney General until the end of the grand jury's term, June 2, 1989, or until he purged himself of contempt. The court released petitioner on his own recognizance pending appeal. Pet. App. E.

2. Petitioner appealed, and on June 6, 1989, the court of appeals affirmed the contempt order in part

and reversed in part.[1] On June 8, 1989, petitioner filed a motion requesting the court to vacate its opinion as moot. He contended that the expiration of the term of the grand jury on June 2, 1989, eliminated any live "case" or "controversy" before the court of appeals. In its response, the government stated that it "agree[d] that the opinion of the Court must be vacated and this case remanded to the district court with directions to vacate the contempt citation." Pet. App. 25a. On June 27, 1989, the court of appeals denied petitioner's motion. The court held that the case fell "within the 'capable of repetition but evading review' exception to the mootness doctrine." Pet. App. 1a.[2]

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[1] The court of appeals affirmed the district court's contempt citation with respect to a subpoena for records of an entity the court referred to as Corporation A; the court rejected petitioner's contentions (1) that, although he is president, chief executive officer and majority shareholder of the corporation, he could not be considered a custodian of its records because the corporation had designated another employee as its official custodian, and (2) that the subpoenaed records were personal rather than corporate. Pet. App. 5a-13a. The court reversed the contempt citation as to the records of an entity the court referred to as Entity B; the court found that there was insufficient evidence to establish that Entity B was a collective entity. *Id.* at 5a, 13a-18a.

[2] The same day that the court of appeals issued its order in this case, another panel issued a decision in a case involving a contempt citation arising from a corporation's refusal to comply with a subpoena issued by the same grand jury at issue here. *In re Sealed Case*, 877 F.2d 976, 981 n.6 (D.C. Cir. 1989). Judge Silberman was the author of the decisions in both cases. Four other members of the court joined those opinions with respect to the issue of mootness: Judges Edwards and Buckley in *In re Sealed Case* and Judges Mikva and Williams in this case.

ARGUMENT

In its response to petitioner's motion to vacate, the government advised the court of appeals that the court was obligated to vacate its judgment and to remand to the district court with instructions to vacate the contempt citation. Upon further consideration, however, we believe that the case was not moot. When the court of appeals issued its judgment, neither party had abandoned its pursuit of a decision in its favor, and, although the term of the grand jury that had issued the subpoenas had ended, the government had not (and still has not) closed the investigation.[3] Accordingly, the case was one that was capable of repetition but had evaded review during the grand jury's term, and the court of appeals' judgment resolved a live controversy over which the court had Article III jurisdiction. The court of appeals' decision not to vacate its judgment was thus well founded. Contrary to petitioner's contention (Pet. 7-11), the decision does not conflict with the decisions of other courts of appeals or of this Court. Further review is therefore not warranted.

1. The exception to the mootness doctrine for cases that are "capable of repetition, yet evading review" is applicable "where two elements combine[]: (1) the challenged action [is] in its duration too short to be

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[3] We have been advised by the United States Attorney's Office that shortly before the expiration of the grand jury's term, a determination was made that the investigation would not be closed, but also would not be actively pursued unless certain developments occurred in a related case in which the grand jury returned an indictment. We are advised that those developments have not as yet materialized, and that the status of the investigation remains unchanged since the court of appeals' judgment.

fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). When the court of appeals issued its decision, this case satisfied both of these conditions.

a. The action challenged in this case–the district court's order holding petitioner in civil contempt–was in effect too briefly to permit plenary appellate review. That order was issued on March 2, 1989, only three months before the grand jury's term was due to expire. Because petitioner was not incarcerated pursuant to the district court's order, the 30-day period for disposition prescribed by 28 U.S.C. 1826(b) did not apply.[4] As the court of appeals noted, petitioner's appeal "was subject to inevitable delays inherent in the typical appellate process." Pet. App. 2a.

Nevertheless, the court of appeals acted very expeditiously. The case was briefed and argued by April 3, 1989, about one month after the contempt citation was issued, and the court issued its decision

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[4] Section 1826(b) provides, in pertinent part, that "[a]ny appeal from an order of confinement" under Section 1826(a) "shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal." With one exception, the courts of appeals have held that this limitation does not apply to cases in which the contemnor has been released pending appeal. *In re Sealed Case*, 829 F.2d 189, 190 (D.C. Cir. 1987); *In re Grand Jury Proceedings [Larson]*, 785 F.2d 629, 631 n.4 (8th Cir. 1986); *In re A Witness Before Special October 1981 Grand Jury*, 722 F.2d 349, 353 (7th Cir. 1983); *In re Weiss*, 703 F.2d 653, 660 n.6 (2d Cir. 1983). Contra *In re Berry*, 521 F.2d 179, 181 (10th Cir.), cert. denied, 423 U.S. 810 (1975). This case does not present that question.

approximately two months after argument. Even so, the court was unable to decide the case before the grand jury's term ended. Under these circumstances, the court of appeals was fully justified in finding that this case satisfied the "evading review" element of the test outlined in *Weinstein* v. *Bradford, supra.*

Relying on *In re Grand Jury Proceedings (Doe)*, 863 F.2d 667 (9th Cir. 1988), petitioner argues that statutes giving priority to appeals from civil contempt citations are sufficient to assure that issues raised by refusals to comply with subpoenas will not evade review within the meaning of the exception to the mootness doctrine. The implication of this argument is that a contempt citation should be vacated if there is a likelihood that it can be litigated to conclusion during a new grand jury's term. See Pet. 7-8. However, the fact that there might be time in a subsequent grand jury's term to issue identical subpoenas to petitioner, relitigate their enforceability and the sufficiency of petitioner's defenses, notice a new appeal, and complete appellate review does not require the conclusion that this case was moot. See *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 578 (1987).[5] Par-

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[5] In *California Coastal Comm'n*, a mining company that had obtained federal approval of a five-year plan of operations and had commenced mining filed an action alleging that a state permit requirement was preempted. While the case was on review, the five-year plan expired. Noting that it was likely that the company would submit new plans in the future, the Court concluded that the controversy was one that was capable of repetition, yet evading review. 480 U.S. at 578. The Court rejected the contention that it was necessary for the company to demonstrate that the case would probably again evade review if a new suit were filed after a new five-year plan had been

ticularly in the context of a grand jury investigation, the Court's cases and the interests underlying the requirement of a case or controversy should not be read to require this kind of duplicative litigation.

Even if the relevant question were whether a dispute arising from a refusal to comply with a subpoena would evade review not only when it is first presented on appeal but also in a successive round of litigation, appeals from contempt orders that are not subject to the 30-day requirement of Section 1826(b) would often evade review under current conditions in the federal courts. As the Eighth Circuit observed in *In re Grand Jury Proceedings [Larson]*, 785 F.2d 629, 631 (1986) (footnote omitted):

> [b]ecause a grand jury's term and its investigations are by their very nature of limited and relatively short duration, it is probable that contempt issues, in the absence of confinement or commitment, * * * "could not, or probably would not, be able to be adjudicated while fully 'live.'"

Accord *In re Sealed Case*, 877 F.2d 976, 981 n.6 (D.C. Cir. 1989). See also *Bursey* v. *United States*, 466 F.2d 1059, 1088-1089 (9th Cir. 1972).[6]

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approved. See 480 U.S. at 607 n.1 (Scalia, J., dissenting).

[6] Grand juries typically sit for 18-month terms. See Fed. R Crim. P. 6(g). According to the *Annual Report of the Director of the Administrative Office of United States Courts* 156 (1988), for the 12 months ending June 30, 1988, the median periods during which civil cases (other than prisoner petitions) that were resolved after hearing or submission remained in the courts of appeals ranged from 7.1 months in the Third Circuit to 22.1

There is no conflict between the court of appeals' decision and *In re Grand Jury Proceedings (Doe)*, *supra*, on the question presented by the petition. In *Doe*, the Ninth Circuit, relying on the 30-day limitation in Section 1826(b), found that it was "able to review most recalcitrant witness cases in a timely manner, and in the few instances, such as this one, which arise at the end of a grand jury's term, if the government recalls the witness before the next grand jury [the court could] do so before the end of that term." 863 F.2d at 670. Thus, the court held that an appeal from a contempt order became moot upon the expiration of the term of the grand jury.

As the court of appeals noted in this case (Pet. App. 1a-2a), *Doe* was based on the premise that contempt appeals are generally covered by the 30-day requirement in Section 1826(b). That statute was the stated basis for the *Doe* panel's finding that contempt appeals would be expeditiously processed and for its determination that it was not bound by *Bursey* v. *United States*, *supra*. In *Bursey*, the Ninth Circuit had held that contempt appeals were among the cases that

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months in the Tenth. Thus, half of the appeals in those courts took longer than that.

The priority prescribed by 28 U.S.C. 1657 (Supp. IV 1986) is insufficient to assure that contempt appeals will not evade review. Under that Section, courts are directed only to "expedite" recalcitrant witness appeals. In addition to those appeals, a variety of matters, including criminal appeals, habeas corpus appeals, and appeals in actions for temporary or permanent injunctive relief, are entitled to priority in the courts of appeals. Thus, when the 30-day limit of Section 1826(b) is inapplicable, recalcitrant witness appeals compete for judicial attention with a substantial number of other priority appeals.

are capable of repetition, yet evading review. The panel in *Doe* acknowledged that *Bursey* would have been controlling but for the enactment of Section 1826(b). Thus, contrary to petitioner's suggestion (Pet. 7-8), *Doe* cannot fairly be viewed to apply to cases, like this one, to which Section 1826(b)'s 30-day requirement has been held inapplicable. In effect, *Doe* held that when Section 1826(b) applies, the exception to the mootness doctrine for disputes that are capable of repetition, yet evading review, is unavailable. In this case, the court of appeals held that when Section 1826(b) does not apply, contempt appeals do fall within that exception. While the two decisions manifest potentially divergent understandings as to the scope of Section 1826(b),[7] that question was not raised in the court of appeals and is not presented by the petition. Thus, there is no conflict between *Doe* and the decision in this case that warrants this Court's review.

b. This case was also "capable of repetition" within the meaning of the mootness doctrine. To satisfy that requirement, there need only be a "reasonable likelihood" that a dispute will recur. See *Honig* v. *Doe*, 484 U.S. 305, 318-320 & n.6 (1988). The issue is not whether it is more likely than not that a dispute will recur, but "whether the controversy was *capable* of repetition." *Id.* at 319 n.6.

The expiration of the term of a grand jury does not automatically terminate a dispute over the enforceability

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[7] Going outside the court of appeals' opinion in *Doe*, petitioner points out that the contemnor in that case was not incarcerated. Pet. 7 & n.5. Thus, it appears that the D.C. Circuit would have found the 30-day limitation in Section 1826(b) inapplicable to the facts of *Doe*. See note 3, *supra*.

of a grand jury subpoena. In many cases, successor grand juries take up investigations commenced by other panels and thus require the same testimony or documents that have already been the subject of dispute.[8] Until the government decides to close an investigation that has not been completed before the expiration of a grand jury's term, therefore, there is a reasonable likelihood that a dispute over the enforceability of a subpoena will be repeated. See *SEC* v. *Sloan*, 436 U.S. 103, 108-110 (1978).[9] In our view, it would have been error for the court of appeals to conclude, solely on the basis of the expiration of the term of the grand jury in this case, that the case was incapable of repetition. There was thus nothing "remarkable" (Pet. 11) in

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[8] Rule 6(e)(3)(C)(iii), Fed. R. Crim. P., expressly authorizes an attorney for the government to disclose matters occurring before one federal grand jury to another federal grand jury. See also *Shillitani* v. *United States*, 384 U.S. 364, 371 n.8 (1966) (noting that orders confining recalcitrant witnesses "may be continued or reimposed if the witnesses adhere to their refusal to testify before a successor grand jury"); *United States* v. *Thompson*, 251 U.S. 407 (1920).

[9] It is the "general policy" of the Justice Department "not to subpoena and seek contempt citations in a grand jury against a witness who refused to testify before [a] prior grand jury and was consequently incarcerated for such refusal." *United States Attorneys' Manual* § 9-11.160, at 14 (1988). Authority to pursue such a course must be obtained from the Assistant Attorney General of the Criminal Division. *Ibid.* This policy is inapplicable to this case, since petitioner has not been incarcerated.

The *United States Attorneys' Manual* also recommends that a subpoena should not ordinarily be issued near the end of a grand jury's term to a witness who is expected not to testify, although it recognizes that that decision "is a matter of judgment for the U.S. Attorney." *Id.* at 14.

the fact that the court of appeals issued its opinion notwithstanding its awareness that the grand jury's term had expired. At that point, the court had nothing before it that suggested that there was no "reasonable likelihood" that the dispute would be renewed before a new grand jury. In fact, when the court of appeals issued its judgment, the United States Attorney's Office had not abandoned the possibility of pursuing the investigation that led to the issuance of the subpoenas before a new grand jury, and it has still not done so.

The facts of this case are therefore distinguishable from those in *In re Grand Jury Proceedings [Larson]*, *supra*. See Pet. 9-10. In *Larson*, the grand jury that had issued the subpoenas at issue had returned an indictment against the target of the investigation, and the target had entered a guilty plea. The court of appeals sought information from the government concerning the status of the grand jury investigation and was advised that the grand jury had been released. Thereafter, the court issued an order directing the parties to show cause why the case should not be dismissed as moot, and the government filed no response. On the facts in that case, which included an indictment against the target of the investigation, the release of the grand jury, and the absence of a response by the government to the order to show cause, the Eighth Circuit found that there was no "reasonable expectation" that the contemnors would again be subpoenaed to testify about the target's alleged offenses.[10] Thus, *Larson* and this case both recognize the

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[10] In *United States* v. *Universal Mfg. Co.*, 525 F.2d 808, 811 n.2 (1975), by contrast, the Eighth Circuit held that a dispute over the disposition of records produced pursuant to a grand jury

basic principle that the expiration of a grand jury's term does not automatically moot an appeal from a civil contempt order. The different results in the two cases are attributable to particular facts bearing on the likelihood that the investigations at issue would be continued. Even if there were a conflict between the decisions on that level, it would not call for this Court's review.[11]

Finally, the court of appeals' decision does not conflict with *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). In *Munsingwear*, a dispute became moot before the court of appeals could render a decision on the merits, and the appellant was thus deprived of its right to appellate review. In that situation, the Court held that the proper disposition was to vacate the judgment on appeal and to remand with instructions to dismiss the action. Here, the court of appeals correctly found that the action had not been moot when it issued its judgment in petitioner's appeal as of right.

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subpoena was not rendered moot by the expiration of the grand jury's term. The court noted that a new grand jury had been convened and was continuing the investigation of its predecessor. It is thus clear that the decision in *Larson* was dependent on facts demonstrating that the government had abandoned the investigation in that case.

[11] The Fifth Circuit's brief *per curiam* decision in *Leppig* v. *Martin*, 386 F.2d 190 (1967), did not address the "capable of repetition, yet evading review" exception to the mootness doctrine and thus does not support further review. See also *Graziadei* v. *United States*, 319 F.2d 913 (7th Cir. 1963) (holding appeal from denial of motion to quash grand jury subpoena was moot; no discussion of "capable of repetition, yet evading review" exception).

2. In short, notwithstanding the position that the government expressed in the court of appeals, that court's refusal to vacate its judgment was well founded. Moreover, the adoption of petitioner's position would undercut the effectiveness of grand jury investigations and sound judicial administration. If the expiration of a grand jury's term were held automatically to moot a case involving a contumacious witness, persons who were inclined to resist compliance with grand jury subpoenas would have an incentive to challenge the subpoenas and to draw out enforcement proceedings in an effort to moot any adverse rulings. That incentive would increase as the end of the grand jury's term approached. If appellate review could not be completed before the end of the grand jury's term, the same dispute would have to be relitigated from the beginning, and the second grand jury's investigation might be seriously delayed. Because the success of a grand jury investigation is often dependent on an appellate ruling that a subpoena is enforceable, petitioner's approach would frequently require a second grand jury to undertake time-consuming subpoena enforcement measures simply to obtain the very appellate ruling that the court of appeals was positioned to render when the earlier grand jury's term expired.

To avoid these problems, grand juries would have an interest in issuing subpoenas as early as possible in their investigations, making it more difficult for them to conduct investigations that are both effective and discriminating. A district judge who wished to assure the effectiveness of a contempt citation might be inclined to deny a contemnor release pending appeal, in order to ensure the applicability of the 30-day requirement of Section 1826(b) in cases like this one.

If the court released the defendant and review could not be completed by the end of the grand jury's term, the district court's work, along with any effort the parties and the court of appeals had committed to the case, would become an exercise in futility–even if it were certain that another grand jury would continue the investigation. Nothing in the principles underlying the mootness doctrine or this Court's decisions justifies such a wasteful and counterproductive regime.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[*] The Solicitor General is disqualified in this case.

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